In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 908

JOSEPH A. GARGANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 338 F. 2d 893.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1964. A petition for rehearing was denied on January 14, 1965. The petition for a writ of certiorari was filed on February 13, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner could properly be convicted of conspiring to import and facilitate transportation of heroin into the United States, even though the conspiracy was frustrated and no heroin was imported.

2. Whether petitioner's sentence, within the statutory limit, should be reduced because a co-defendant who had pleaded guilty received a lighter sentence.

STATUTE INVOLVED

21 U.S.C. 174 provides in part as follows:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. * * *

STATEMENT

Petitioner and others (Radican, Bush, Van Detti and Iacobucci) were charged in an indictment returned in the United States District Court for the Southern District of Ohio with conspiracy to import

and facilitate the transportation of heroin into the United States in violation of 21 U.S.C. 174 (R. 2a-3a). The charges were dismissed against Radican and Iacobucci after Radican had pleaded guilty to an indictment charging violation of 18 U.S.C. 1403—using the mails to attempt to import drugs (R. 3a-5a). Bush entered a plea of guilty (R. 15a). The jury found petitioner guilty and Van Detti not guilty (R. 5a, 6a). Petitioner was sentenced to imprisonment for ten years (R. 8a-9a) and Bush for five years (R. 10a-11a). On appeal petitioner's conviction was affirmed.

Pertinent evidence adduced at the trial may be summarized as follows:

Radican, a student at the University of Dayton, first met petitioner in November 1960 when petitioner was the manager for gambling at the Yorkshire Club in Newport, Kentucky (R. 1b). In the early part of March 1962 Radican telephoned petitioner, saying that he knew of a source of heroin in Korea and wanted to find a purchaser. Petitioner replied that he was not personally interested but would try to find someone if Radican was serious (R. 1b-2b). About this time petitioner told Bush that he (petitioner) had a "connection" to obtain narcotics from Korea and would let Bush know about it later (R. 10b-11b).

On March 13, 1962 petitioner arranged a meeting with Radican (R. 3b). At the meeting, held for about 20 minutes in petitioner's car, petitioner introduced Bush under the name "Al" to Radican (R. 4b, 12b-

13b). Radican showed petitioner and Bush a letter Radican had received from a soldier in Korea (John Spilman) about supplying heroin (R. 3b). Petitioner observed that if what was said in the letter was true, "we wouldn't have to worry about any money and all be living on yachts" (R. 4b). Bush said that he had a "connection" who could sell any heroin that would come into the country. It was agreed that if any heroin did come in, Radican was to telephone petitioner in Cincinnati and that petitioner would notify Bush (R. 3b-4b, 13b-14b). Petitioner suggested that if Radican obtained any heroin he should refer to it as a "pair of pants" and told Radican to burn the letter (R. 4b). Upon returning to Dayton that evening, Radican wrote a letter to Spilman in Korea, explaining that he had made necessary arrangements to take care of any shipment to the United States (R. 5b).

During the early part of June 1962, after receiving a letter from Spilman about the money necessary for a heroin purchase, Radican called petitioner to say that he needed at least $240 (R. 5b-6b). In a telephone conversation petitioner told Bush to give Radican the $200 or $300 he wanted and that petitioner would stand good for repayment (R. 15b-17b, 22b). After calling petitioner again about arranging a meeting with Bush, Radican met Bush in Covington, Kentucky on about June 6 (R. 7b, 16b). Subsequently Bush mailed $240 in money orders to Radican at his parents' address in Elyria, Ohio (R. 7b, 16b, 17b). Radican, who had previously sent Spilman $80,

cashed the money orders and sent $200 to Spilman in Korea (R. 5b-7b).

On June 21, 1962 petitioner told Bush he had not decided how the narcotics were to be delivered, but promised that Bush would not have to handle the package or the money (R. 18b). Later, when Bush telephoned petitioner that he had no one to sell the expected narcotics, petitioner told him to see Van Detti. Van Detti told Bush that he had already talked to petitioner, knew about the situation, and was going to make arrangements to sell the narcotics (R. 19b).

Radican received a letter from Spilman saying that a Mr. Martin would call on him (R. 24a). On July 11, 1962 Radican telephoned petitioner in Cincinnati and informed him that Joseph Martin, the big man from Korea, was in town with the "pants", and wanted to meet the parties from Covington and Newport. Petitioner told Radican that he would notify Bush (R. 8b). Radican spoke several times on the telephone to Bush, saying that the package had arrived and directing Bush to meet him at the Biltmore Hotel in Dayton at 11:30 p.m. (R. 8b-9b, 21b). During his trip to Dayton, Bush telephoned petitioner who said he could not leave the house that night because his wife was gone and he had to take care of his children (R. 21b-22b). After Bush met Radican at the Biltmore Hotel they went to a motel in Dayton, where, after a conversation with a person named Joseph Martin [1] they were arrested by federal agents (R. 9b, 22b).

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[1] Martin was an assumed name for Mr. Lining, an undercover agent of the United States Customs, who had no nar-

Testifying on his own behalf, petitioner admitted telling Radican in answer to his telephone request for a dealer in narcotics that he (petitioner) would see what he could do for Radican. His explanation was that he expected in a few days Radican "would forget about it" (R. 25b-26b). In contradiction to testimony by Radican and Bush that petitioner remained in his car throughout the entire discussion on March 13, 1962, petitioner testified that as soon as he saw the word "heroin" in the letter he told Radican and Bush they were both "crazy," left the car and did not hear the rest of the discussion (R. 40a-41a).

ARGUMENT

1. Petitioner contends that, since Spilman had spoken to government agents when he wrote the letter which Radican showed petitioner and Bush in March 1962,[2] and since Martin, acting for the government, could not import narcotics illegally, petitioner could

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cotics in his possession when he was in the motel room (R. 49a, 50a). Radican had met Martin in accordance with directions given in a letter from Spilman to Radican. For identification purposes, Martin had one half of Spilman's photograph and Radican had the other half. When he spoke to petitioner and Bush, Radican did not know that Martin was the assumed name of an undercover agent (R. 24a-26a).

[2] Although petitioner's factual assertion does not clearly appear from the record made at the trial, we acknowledge it to be true. So far as the extra-record circumstances suggest a possibility of entrapment, however, it seems proper to point to a related fact not disclosed by the record—that Radican had written to Spilman about supplying narcotics before the government became in any way involved.

not be guilty of a conspiracy to import. However, there can be no doubt that petitioner, Radican and Bush did enter into an agreement to import narcotics and sell them, and that they did commit overt acts in furtherance of the conspiracy. The contention (Pet. 7-8) that petitioner's participation was conditioned on the actual receipt of narcotics is refuted by the evidence that he participated in arranging for the necessary funds to pay for the importation. Whether or not petitioner and his co-conspirators were capable of carrying out their plan (*i.e.*, whether or not Spilman was a conspirator or was acting for the government) is immaterial. The offense of conspiracy was committed and was punishable even though the conspiracy was not ultimately consummated. *United States* v. *Bayer*, 331 U.S. 532, 542; *Hanford* v. *United States*, 231 F. 2d 661, 662 (C.A. 4). Since the conspirators expected heroin to be brought into the United States and were ready and willing to facilitate disposition of the narcotics when it arrived, petitioner's guilt under the conspiracy charge was established. Cf. *Williamson* v. *United States*, 207 U.S. 425, 446-447; *Britton* v. *United States*, 60 F. 2d 772, 773 (C.A. 7), certiorari denied, 287 U.S. 669; *United States* v. *Agueci*, 310 F. 2d 817, 828 (C.A. 2), certiorari denied, 372 U.S. 959. And since the plan was to obtain the narcotics from Korea, *i.e.* to import it, there was no need to rely on any presumption from possession.

2. Where a sentence is within the statutory limits it is not subject to a claim of excessive punishment by reason of a lesser sentence imposed upon a co-de-

fendant. *Randall* v. *United States*, 324 F. 2d 726, 727 (C.A. 10); *Ellis* v. *United States*, 321 F. 2d 931 (C.A. 9); *Johnson* v. *United States*, 318 F. 2d 855, 859 (C.A. 8); *Dillon* v. *United States*, 113 F. 2d 334, 339 (C.A. 8), certiorari denied, 311 U.S. 689. Petitioner's 10-year sentence was well within the possible 20-year statutory maximum. No abuse of the court's discretion was shown merely be reason of imposition of a shorter 5-year sentence upon co-defendant Bush, a lesser figure brought into the venture by petitioner, who was a principal conspirator.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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